STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 7, 2001
V AMIRA SAMI SALEM, Defendant-Appellant.	No. 205746 Macomb Circuit Court LC No. 95-001195-FH
PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	
V BETTINA SCHRECK, Defendant-Appellant.	No. 206323 Macomb Circuit Court LC No. 95-001194-fh
	AFTER REMAND

Before: White, P.J., and Doctoroff and O'Connell, JJ.

PER CURIAM.

Defendants were each convicted of delivery of 225 grams or more but less than 650 grams of heroin, MCL 333.7401(2)(a)(ii), and conspiracy to deliver 225 grams or more but less than 650 grams of a heroin, MCL 750.157a, and each sentenced to consecutive terms of twenty to thirty years' imprisonment. Both defendants appealed as of right, challenging the trial court's denial of their motions to dismiss on the ground of entrapment, among other things. This Court vacated the trial court's opinions and orders on the entrapment issue, remanded for a new entrapment hearing to permit defendants to confront and cross-examine the informant, and retained jurisdiction. *People v Salem & Schreck*, unpublished opinion per curiam, issued 1/12/01 (Docket Nos. 205746, 206323).

On remand, the trial court held an entrapment hearing on May 22, 2001, at which defendants cross-examined the informant. Both defendants filed briefs thereafter, arguing that the informant's testimony was incredible and that they had shown entrapment. The trial court

again denied defendants' motions to dismiss on the basis of entrapment in an opinion and order dated June 15, 2001, and transmitted the case to us for further review.

I

In a supplemental brief filed with this Court post-remand,[1] defendant Salem argues that she was denied her constitutional right to a public trial when the trial court closed the entrapment hearing to the public without holding a hearing, as required by *Waller v Georgia,* 467 US 39; 104 S Ct 2210; 81 L Ed 2d 31 (1984), and that the matter should be remanded for a third hearing. Under the unique circumstances presented here, we do not agree.

A

> The Sixth Amendment guarantees every criminal defendant a "speedy and public trial." US Const, Am VI; Const 1963, art 1, § 20. Although the right to an open trial is not absolute, that right will only rarely give way to other interests. *Waller v Georgia* [*supra*]. In *Waller,* the Court, quoting *Press Enterprise Co v Superior Court of Cal, Riverside Co,* 464 US 501, 510; 104 S Ct 819, 824; 78 L Ed 2d 629 (1984), emphasized the need for specific findings to help determine whether an order of closure is proper:
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> > The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.
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> > * * *
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> The requirements for the total closure of a trial were set forth by the Supreme Court in *Waller*: (1) The party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, (2) the closure must be no broader than necessary to protect that interest, (3) the trial court must consider reasonable alternatives to closing the proceeding, and (4) it must make findings adequate to support the closure. [*Waller, supra*], 467 US at 48, 104 S Ct at 2216, quoting *Press-Enterprise Co, supra*. [*People v Kline,* 197 Mich App 165, 169; 494 NW2d 756 (1992).]

[1] This Court granted Salem's motion to file a supplemental brief after remand by order dated August 3, 2001.

Deprivation of the right to a public trial is one of the constitutional errors that is not subject to harmless error analysis.[2] *In re Osborne*, 237 Mich App 597, 605; 603 NW2d 824 (1999), citing *Waller, supra*, 467 US at 49 n 9.

B

This Court's remanding to the trial court for an entrapment hearing to allow defendants the opportunity to confront and cross-examine the informant stated that the trial court "may enter an appropriate protective order, but may not impinge on defendants' right to confront and cross-examine Issa concerning his credibility and his involvement in the matter at issue." *People v Salem & Schreck, supra,* slip op at 11. At the start of the entrapment hearing, the trial court so noted, and the following discussion occurred:

> THE COURT: Before you [counsel] do that [place your appearances in the record] I would indicate in the Court of Appeals opinion, in fact, on Page 11, the last page and the last paragraph of this opinion, it was indicated by the Court of Appeals that the Court may enter an appropriate protective order. We have done that. We have sealed the courtroom. . . . .
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> * * *
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> MR. FEDORAK [*prosecuting attorney*]: . . . . Now, regarding the closed courtroom, I am the one who requested the closed courtroom. We did have that conversation in chambers. Obviously the Court has ruled regarding that. I don't know if counsel wants to address that issue.
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> MR. VanHOEK [*counsel for defendant Schreck*]: Well, at this point, your Honor, I don't have any objections to the closed courtroom.
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> MS. LERG [*counsel for defendant Salem*]: Your Honor, Robin Lerg on behalf of Amira Salem.
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> I did want to place an objection on the record but recognize the Court of Appeals direction that the Court may enter an appropriate protective order.
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> THE COURT: So noted.

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[2] Salem supports her claim by arguing in pertinent part:

> It can be argued that it is easier for a witness to give false testimony when the courtroom is empty. This is particularly true in this case, where it was extensively argued below that Issa was not a credible witness, gave evasive answers, looked to the prosecution table for answers, gave testimony that defied logic and gave testimony that was not supported by other testimony (see *Defendant's Brief in Support of Entrapment on Remand*). If the courtroom had not been closed, Issa might have given different testimony.

The rationale for this Court's suggesting that an appropriate protective order be entered on remand was derived from Issa's concerns regarding his family's safety, as expressed in his testimony at the in camera hearing, the record of which was sealed and remains sealed.[3] It was against this backdrop that this Court stated in its opinion remanding for an entrapment hearing that the trial court "may enter an appropriate protective order, but may not impinge on defendants' right to confront and cross-examine" the informant. Our intent was to permit the trial court to restrict defendants' cross-examination of Issa to matters related to the entrapment defense. Apparently the trial court and counsel interpreted our reference to "an appropriate protective order" as directed toward keeping the informant's identity and testimony out of the public domain. To the extent it was anticipated that Issa would reveal a true identity other than "Joe Issa," as known to defendants, an order closing the courtroom for portions of the testimony would be appropriate to avoid revealing his identity to the public. However, Issa testified at the entrapment hearing on remand that his name is, in fact, Joseph Issa.

We conclude, however, that while Salem's counsel stated the objection quoted above, the issue was not adequately preserved. We have no record of the discussions held in chambers. It has not been established that Salem cited *Waller, supra*, to the court, or that she argued that closing the courtroom was not an appropriate protective order because other more narrowly-drawn alternatives could adequately protect the prosecution's and witness' interests. We have only the statement of Salem's counsel that she did want to place an objection on the record but recognized the Court of Appeals direction that the trial court may enter an appropriate protective order. This does not adequately convey the argument that closure is not an appropriate protective order under the circumstances, and that a different protective order would be more appropriate. Further, when it became clear that Issa's real identity was Joseph Issa, Salem did not renew her objection.

II

Defendants argue that with the addition of Issa's testimony, they have made out claims of entrapment. We disagree.

This Court reviews a trial court's finding regarding entrapment for clear error. *People v Connolly*, 232 Mich App 425, 428-429; 591 NW2d 340 (1998). Michigan courts use the objective test of entrapment, which focuses on the government's conduct that resulted in the charges against the defendant, rather than on the defendant's predisposition to commit the crime. *People v Hampton*, 237 Mich App 143, 156; 603 NW2d 270 (1999). Entrapment occurs when (1) the police engage in impermissible conduct that would induce a person situated similarly to the defendant and otherwise law abiding to commit the crime, or (2) the police engage in conduct

[3] Issa had testified in camera on April 30, 1997, and the transcript of that testimony was sealed. The transcript of his in camera testimony was available to the prosecutor and defendants' attorneys for the first time on the day of the entrapment hearing on remand, May 22, 2001. Defendants' counsel noted at the time that they had not had an opportunity to go through the transcript with their clients. The prosecutor responded that he would not object to an adjournment for that reason. However, the trial court stated that it wanted to proceed, and counsel for both defendants agreed that the hearing should go forward without adjournment.

so reprehensible that it cannot be tolerated by the court. *Id.* Under the first prong of the entrapment test, the trial court should look at the following factors:

> (1) whether there existed any appeals to the defendant's sympathy as a friend; (2) whether the defendant had been known to commit the crime with which he was charged; (3) whether there were any long time lapses between the investigation and the arrest; (4) whether there existed any inducements that would make the commission of a crime unusually attractive to a hypothetical law-abiding citizen; (5) whether there were offers of excessive consideration or other enticement; (6) whether there was a guarantee that the acts alleged as crimes were not illegal; (7) whether, and to what extent, any government pressure existed; (8) whether there existed sexual favors; (9) whether there were any threats of arrest; (10) whether there existed any government procedures that tended to escalate the criminal culpability of the defendant; (11) whether there was police control over any informant; and (12) whether the investigation is targeted. [*People v James Williams*, 196 Mich App 656, 662-663; 493 NW2d 507 (1992), citing *People v Juillet*, 439 Mich 34, 56-57; 475 NW2d 786 (1991).]

Entrapment exists under the second prong of the entrapment test if the police conduct is so reprehensible that the court cannot tolerate the conduct and will bar prosecution on the basis of the conduct alone. *People v Fabiano,* 192 Mich App 523, 531-532; 482 NW2d 467 (1992).

Defendant Salem challenges the trial court's findings on six of the factors: 1, 2, 5, 10, 11 and 12, and argues that Issa's testimony was not credible. Defendant Schreck's supplemental brief on remand, filed in the trial court, primarily challenged the informant's credibility as well.

The trial court's findings on remand as set forth in its opinion and order were:

> Here, the testimony demonstrated there were no appeals to defendants' sympathies as a friend. It is true a friendship did develop between defendants and Issa and this fostered the narcotics transaction that led to their arrest. However, there is no testimony to show Issa played on this friendship and appealed to them to help him sell narcotics. Rather, the testimony shows defendants were the ones who had the idea to sell narcotics and solicited Issa's help. This factor weighs against a finding of entrapment.
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> [factor 2] Moreover, defendants were known to commit the crime for which they were charged. . . . The facts demonstrate that defendant Schreck previously sold narcotics in Germany. Moreover, Mr. Martin, who engaged in narcotics dealings with Salem, stated defendants were looking to sell drugs and had a desire to begin a wholesale drug operation.
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> * * *
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> [factor 5] In the present case, Issa was paid approximately $6,000.00 for his expenses. There was no suggestion in the testimony that any payment hinged on the conviction of defendants. Further, since 1989, Issa's source of income

included retail employment. Issa claimed he could not remember what percentage of his income is attributable to the compensation he received as an informant. This record does not demonstrate that the amount paid to Issa in this case constitutes excessive consideration.

In terms of "other enticement", Schreck testified she had accumulated large debts to local drug dealers and was being threatened by drug dealers to repay her debts. Defendant Schreck also testified that Issa, aware of these problems, re-established her addiction to heroin by inducing her to sample and sell an ounce of heroin for him for $6,000.00, holding out the prospect of using the profit from its sale to pay against her drug debts. Issa unequivocally denied ever having supplied Schreck with heroin to sample and/or sell. Jamal "Jim" Bazzi testified Schreck never owed him any money and that he never threatened anyone's life over a drug debt. Martin also testified Schreck only owed him $100.00 or $150.00, not $30,000.00. The Court finds defendants have not shown by a preponderance of the evidence that defendants were induced to commit a crime by promises of a large profit which they could use to pay off alleged narcotic debts. This factor weighs against a finding of entrapment.

Regarding factor 10, whether government procedures tended to escalate defendants' criminal culpability, the trial court found:

Nor were there any procedures that tended to escalate the criminal culpability of the defendants. Defendant Schreck indicated that she and Salem had a connection in Lebanon where they could get large amounts of either cocaine or heroin. Consequently, any encouragement by the police for defendants to sell larger amounts of drugs did not result in any exposure to a greater penalty than defendants could have been exposed to before the police became involved in this matter. Compare People v Potra, 191 Mich App 503, 511-512; 470 [sic 479] NW2d 707 (1991). In terms of government pressure, Issa testified that he provided Salem with the phone number of a buyer (Det. Hurley) and that he paid for defendants' airfare to New York to purchase drugs. However, defendants have failed to demonstrate by a preponderance of the evidence that but for these provisions by Issa, the crime would not have been committed.

Regarding factors 11 and 12, the trial court stated:

The Court is satisfied the investigation against defendants was targeted. The government brought the names of defendants to Issa after receiving information that defendants were looking to sell large quantities of cocaine. Compare People v Juillet, 439 Mich 34; 475 NW2d 507 (1992), (finding the police to have sent the informant on a fishing expedition to find "dealers", and the arrest of defendant occurred when neither the informant nor the police had reason to believe that the crimes charged were actually being committed). Moreover, Issa testified on cross-examination that he informed the FBI about every detail in his relations with defendants.

* * *

> Looking at all these factors together, the Court is not persuaded defendants established, by a preponderance of the evidence, that they were entrapped under the first prong. The Court must still consider whether defendants' have met their burden as it relates to the second prong: that the police engage in conduct so reprehensible that it cannot be tolerated by the court. Entrapment could also occur under this second prong if the furnishing of the opportunity for a target to commit an offense "requires the police to commit certain criminal, dangerous, or immoral acts." People v Jamieson, 436 Mich 61, 95-96; 461 NW2d 884 (1990).

Regarding the second entrapment test prong, the trial court found:

> Under the second prong of the entrapment test, the Court finds that the police did not engage in conduct so reprehensible that it cannot be tolerated. Bazzi testified defendant Salem had an idea for him to marry Schreck so she could get her green card and stay in the United States. INS Agent Houghtaling confirmed defendants arranged the "sham" marriage. In People v Connolly[,] 232 Mich App 425; 591 NW2d 340 (1998), the Court determined that a law enforcement officer may distribute controlled substances as a means of detecting criminal activity. Since, as the Court stated in its earlier opinion, the mere provision of a man for a wedding is no more shocking, criminal, dangerous, or immoral than the use of controlled substances for drug transactions in criminal investigations, the Court is not convinced the police conduct in relation to this marriage is reprehensible.
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> Defendants have not shown by a preponderance of the evidence that the charges brought against them are the result of entrapment. Rather, the Court finds the police did nothing more than furnish an opportunity to commit a crime which was readily accepted. **Although at times the testimony of all witnesses was difficult to accept, as a whole, the people's witnesses were sufficiently credible to satisfy this court that entrapment did not occur.** Therefore, defendants' convictions must stand. [Emphasis added.]

Having thoroughly reviewed the testimony at the entrapment hearings, we conclude that the trial court's findings were not clearly erroneous. As the trial court alluded to, the testimony in its totality was troubling; however, we agree with the trial court that as a whole, the prosecution's witnesses were sufficiently credible, and find no error in the court's conclusion that defendants did not establish entrapment by a preponderance of the evidence.

Further, the conduct asserted as reprehensible either was denied (e.g., Issa's getting Schreck back on drugs) or was initiated by defendants (e.g., obtaining a husband for Schreck). We also observe that there was no claim that the undercover agent-husband caused defendants to be involved in the drug transactions or escalated the amount of drugs involved.

III

Defendant Salem raised several issues in her initial appellate brief that we did not address given our remand for an entrapment hearing. Defendant Salem argued that she received ineffective assistance of counsel.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction . . . resulted from a breakdown in the adversary process that renders the result unreliable. [*People v Hoag*, 460 Mich 1, 5-6; 594 NW2d 57 (1999), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984).]

A defendant has the burden of establishing the factual predicate for a claim of ineffective assistance of counsel. *Hoag, supra* at 6.

> [T]o the extent [a defendant's] claim depends on facts not of record, it is incumbent on him to make a testimonial record at the trial court level in connection with a motion for a new trial which evidentially supports his claim and which excludes hypotheses consistent with the view that his trial lawyer represented him adequately. [*Hoag, supra* at 6, quoting *People v Ginther*, 390 Mich 436, 442-443; 212 NW2d 922 (1973).]

Defendant did not move for a new trial or an evidentiary hearing below, thus our review is limited to the existing record. *Hoag, supra* at 6.

Salem argues that her trial counsel's decision to elicit testimony regarding communications that took place between her and Hurley before March 7, 1995 opened the door to the only incriminating evidence against her of conspiracy to deliver between 225 and 650 grams of heroin; that trial counsel's decision to ask whether she had ever been a drug addict opened the door to evidence of a prior drug conviction that damaged her credibility; and that trial counsel's decision to invoke the defense of jury nullification cannot be deemed sound trial strategy.

To prove a conspiracy to deliver a controlled substance, the prosecution must prove that 1) the defendant possessed the specific intent to deliver the statutory minimum as charged, 2) the defendant's coconspirator possessed the specific intent to deliver the statutory minimum as charged, and 3) the defendant and her coconspirator possessed the specific intent to combine to deliver the statutory minimum as charged to a third person. *People v Mass,* __ Mich __; 628 NW2d 540 (2001), slip op at 15-18; *People v Justice (After Remand),* 454 Mich 334, 349; 562 NW2d 652 (1997).

We reject Salem's argument that the only incriminating evidence of conspiracy against her was elicited by her trial counsel from Hurley on cross-examination, when Hurley testified that he met Schreck and that Salem introduced Schreck to Hurley as her (Salem's) partner. There was ample testimony presented before defense counsel cross-examined Hurley from which the jury could have concluded that defendants had the specific intent to combine to deliver the heroin to Hurley. Hurley testified on direct examination that he paged Salem on March 7, 1995, that Salem paged him back with her mobile phone number, he called her, and "she asked if I was still interested in doing business and I wanted to make a purchase of a half kilo of heroin." Hurley testified that he told Salem that he wanted a sample of the heroin before he made the full purchase, and that his communications that day had been with Salem only at this point. Hurley testified that he and Salem attempted to set a time to deliver the sample, and that Salem "indicated to me that Ms. Schreck was already en route to pick up the sample of heroin." Hurley and Salem agreed to meet in a restaurant parking lot around 7:00 p.m., and around that time defendants Salem and Schreck pulled up in a car that Schreck was driving, Salem got out of the car, entered Hurley's vehicle, and gave him a small sample of heroin. About thirty minutes later, Hurley again contacted Salem, who indicated she could sell him only 250 grams of heroin, for $35,000, and they arranged to meet in a different restaurant parking lot around 9:00 p.m. Hurley arrived first, and then defendants arrived in the same car, with Salem driving, and Schreck got out of the car, entered Hurley's vehicle and removed a paper bag from under her jacket. Schreck pulled out from the paper bag a plastic bag containing an off-white chunky substance, showed the plastic bag to Hurley, put it back in the paper bag, Hurley took the bag and put it by his feet. Hurley testified that he started handing Schreck the money, and that the only words spoken were when he asked Schreck why she was not counting the money, to which she responded "That's all right; I trust you." While handing the money to Schreck, Hurley signaled for the arrest team to move in. This evidence was sufficient without more.

We do not agree with Salem that her trial counsel's question to her whether she had ever been a drug addict constituted ineffective assistance. Once the prosecutor stated that he intended to question Salem regarding the prior conviction, Salem's trial counsel argued vigorously against its introduction. In light of the overwhelming evidence of Salem's guilt, including her own testimony that she had national and international drug connections before the police involvement at issue in the instant case, we conclude that even if admitted in error, the evidence of her prior conviction did not result in an unfair trial and that there is no reasonable probability that the result of the trial would have been different absent this evidence.

Salem also argues that trial counsel was ineffective in presenting a jury nullification argument to the jury. Salem contends this was not reasonable trial strategy because the trial court had already rejected defendants' entrapment claims and the jury clearly was not entitled to acquit Salem if it found the police tactics to be reprehensible. She argues that to present entrapment to the jury meant Salem was forced to admit her own guilt of narcotics delivery and conspiracy to deliver.

Generally, this Court will not second-guess an attorney's choice of sound trial strategy, even if it was ultimately unsuccessful. *People v Rice (On Remand)*, 235 Mich App 429, 444-445; 597 NW2d 843 (1999). Salem has not shown that her trial counsel's choice of defense to be patently unreasonable or unsound. Both defendants in this joint trial voluntarily testified that

they agreed to obtain heroin in order to pay off Schreck's drug debts to drug dealers and individuals who were threatening their lives if Schreck's debts remained unpaid. The police traced each step of the March 7, 1995, delivery to undercover officer Hurley and caught defendants "red-handed" in the act of delivery. Although the trial court previously rejected defendants' entrapment defense based on the acts of the alleged police informant, Joe Issa, and undercover officer Hurley, the trial court allowed trial counsel to pursue the entrapment argument before the jury in an attempt to obtain an acquittal. Salem's trial counsel summarized his theory of the case as follows:

> Defendants Amira Salem and Bettina Schreck say for their theory of the case that Bettina Schreck was hooked on heroin by Joe Essa, a government informant, to such an extent that she overdosed and had to go to the hospital; that she became so dependent upon heroin that she incurred debts in excess of $30,000 to various dealers. To extradite, get herself out of debt and threats of death, Amira and Bettina sold or attempted to sell some heroin obtained from Fadi Salhab to an undercover police officer who Joe Essa had introduced them to. Joe Essa having informed the girls that he had done prison time for the sale of drugs.
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> After the arrest, the girls made agreement with the police officer to receive lifetime probation in return for complete debriefing of their drug contact. In return, they were not to be prosecuted by what they were told. They were debriefed and the police failed to honor their bargain after[;] in fact, [they] re-charged the girls in federal court on the same facts by using a wiretap formula. The girls think this is a basic violation of an agreement and unfair treatment of the girls which requires jury nullification and an innocent verdict.

In light of the overwhelming evidence against Salem and Schreck and the lack of other defenses, we conclude that Salem's trial counsel's choice of a jury nullification argument constituted sound strategy. Salem argues that the error stems from the fact that the trial court had already rejected the entrapment defense. However, an attorney's representation is not ineffective per se if he argues an unavailable defense to the jury, see *People v Henry*, 239 Mich App 140, 146-148; 607 NW2d 767 (1999), and the entrapment defense was presented in conjunction with the jury nullification defense, which clearly *was* permitted by the trial court. Jury nullification is the power to dispense mercy by nullifying the law and returning a verdict less than that required by the evidence. *People v Demers*, 195 Mich App 205, 206; 489 NW2d 173 (1992). The trial court expressly allowed Salem's trial counsel to argue for nullification. Under the circumstances, where the jury could have found the police conduct to be reprehensible if it believed defendants, the choice of a jury nullification argument was sound trial strategy.

Salem contends that her trial counsel should have argued that the prosecutor failed to prove that the substance Schreck handed to Hurley on March 7, 1995, actually was heroin. Sheryl Torigian, a crime lab analyst, testified that the substance Schreck handed to Hurley was indeed heroin, a finding that was consistent with the conclusion of a scientist who had tested the substance more than two years earlier. However, when Torigian weighed the heroin during the test she conducted shortly before trial, it weighed approximately three grams more than it had

when it was tested earlier. In any event, the heroin delivered to Hurley when tested initially weighed well over 225 grams.

In light of the consistency between the lab technicians' findings regarding the identity of the substance delivered to Hurley, trial counsel's decision to pursue a jury nullification argument was reasonable. Regardless of the differences in weight, scientific testing proved that the substance defendants delivered to Hurley was heroin and weighed between 225 and 250 grams. This Court should not second-guess trial counsel's decision against basing his trial strategy on the insignificant difference in weight about which Torigian testified. See *Rice, supra* at 444-445.

We conclude that the jury nullification strategy pursued by Salem's trial counsel did not constitute ineffective assistance in light of the overwhelming evidence against defendants and the absence of other defenses. Accordingly, we reject Salem's claim of ineffective assistance of counsel.

IV

Next, Salem argues that the trial court abused its discretion by admitting evidence of a prior drug conviction under MRE 404(b).[4] We disagree.

This Court reviews a trial court's decision to admit evidence for an abuse of discretion. *People v Brownridge*, 459 Mich 456, 460; 591 NW2d 26 (1999). *People v Snider*, 239 Mich App 393, 419; 608 NW2d 502 (2000). This Court will not reverse on the basis of an evidentiary error if it did not affect a substantial right and did not result in a miscarriage of justice. MRE 103(a); MCL 769.26.

MRE 404(b)(1) states in pertinent part:

> Evidence of other crimes . . . is not admissible to prove the character of the person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive . . . [or] intent . . . [.]

Defendants contended that they sold drugs because Issa, a government informant, had caused Schreck to become re-addicted to heroin and to accumulate a large drug debt to satisfy her habit. Defendants claimed drug dealers to whom Schreck owed money threatened to kill them both if Schreck did not repay them. Defendants alleged that Issa then supplied them with drugs and encouraged them to sell the drugs so they could repay Schreck's drug debts.

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[4] Salem also contends that she did not receive pretrial notice of the prosecutor's intention to seek admission of her prior conviction, as MRE 404(b)(2) requires ("The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence."). However, at trial, Salem did not object to admission of her prior conviction on the basis that she lacked notice. Matters not raised before the trial court are generally not preserved for this Court's review. *People v Morey*, 230 Mich App 152, 162; 583 NW2d 907 (1998), aff'd 461 Mich 235; 603 NW2d 250 (1999).

The prosecution offered the prior conviction as proof of motive and intent and to impeach Salem's testimony that she had "never been a drug addict . . . never drank alcohol or smoked a cigarette," which testimony, the prosecution argued, implied that she had never had anything to do with drugs.

Assuming arguendo that the trial court erred in admitting Salem's prior conviction, we conclude that the error was harmless given that Salem testified that she and Schreck did the acts for which they were on trial; obtained and delivered approximately 250 grams of heroin to Hurley on the day in question, at which time they were arrested, and given that Salem further testified of having drug connections in the Detroit area, New York, and Colombia.

V

Next, Salem argues that the cumulative effect of errors denied her a fair trial. Although the cumulative effect of a number of minor errors may in some cases amount to error requiring reversal, *People v Cooper*, 236 Mich App 643, 659-660; 601 NW2d 409 (1999), we do not believe Salem has demonstrated the existence of actual errors. Thus, reversal of her convictions on this basis is not warranted.

VI

Finally, Salem argues that the trial court abused its discretion by refusing to recognize substantial and compelling reasons to depart from the minimum sentence applicable to her delivery conviction. We disagree.

A defendant convicted of delivery of a controlled substance is subject to the mandatory prison terms set forth in the Public Health Code, MCL 333.7401 *et seq.* *People v Northrop*, 213 Mich App 494, 498; 541 NW2d 275 (1995). The statutory minimums generally presume the applicable minimum is the appropriate sentence, and a legislatively mandated sentence is thus presumed to be proportionate and valid. *People v Poppa*, 193 Mich App 184, 188-189; 483 NW2d 667 (1992).

However, a trial court may depart from a mandatory minimum term of imprisonment if it finds on the record that there are substantial and compelling reasons to do so. MCL 333.7401(4); *People v Daniel*, 462 Mich 1, 8; 609 NW2d 557 (2000). Only objective factors that are capable of verification may be used to assess whether there are substantial and compelling reasons to deviate from the minimum term of years imposed by the Legislature for certain drug offenses. *Id.* Objective and verifiable factors that are appropriate to consider include: (1) mitigating circumstances surrounding the offense, (2) the defendant's prior record, (3) the defendant's age, and (4) the defendant's work history. *Id.* at 6-7. It is also appropriate to consider factors that arose after the defendant's arrest, such as cooperation with law enforcement officials. *Id.* at 7.

The existence or nonexistence of a particular factor that might justify a downward departure from a minimum statutory sentence is a factual determination for the sentencing court that is reviewed on appeal for clear error. *People v Fields*, 448 Mich 58, 77; 528 NW2d 176 (1995). The determination that a factor is objective and verifiable is reviewed on appeal as a question of law. The determination whether factors constitute substantial and compelling

reasons to depart from the minimum is reviewed on appeal for an abuse of discretion. *Id.*, 77-78. MCL 333.7401(4), which authorizes sentencing courts to depart downward from the required minimum sentences in drug cases, was intended to vest sentencing courts with narrow discretion only in exceptional cases. *People v Perry*, 216 Mich App 277, 282; 549 NW2d 42 (1996).

Here, Salem was convicted of delivery of 225 grams or more but less than 650 grams of heroin, a drug offense for which the Legislature imposed a mandatory minimum sentence of twenty years.[5] MCL 333.7401(2)(a)(ii). Salem argues that she presented the following substantial and compelling reasons for the trial court to depart from the mandatory minimum sentence for her delivery conviction: (1) she was entrapped; (2) she cooperated fully with the police after her arrest; (3) she was recovering from breast cancer surgery at the time she committed her crimes and may have suffered from "clouded" judgment; and (4) she was gainfully employed and highly educated.

First, Salem's "clouded" judgment is not an objective and verifiable factor and, thus, not a proper consideration. Next, the trial court had already discarded Salem's claim of entrapment because it did not believe it. Based on its previous credibility determination, the trial court did not abuse its discretion by refusing to recognize entrapment as a substantial and compelling reason to depart from the mandatory minimum sentence. Third, Salem's employment history and her education pale in comparison to her drug activities, which, according to the evidence, were quite substantial. As the Supreme Court recognized in *Daniel*, *supra* at 7 n 8, the Legislature's decision to allow downward departure from the mandatory sentencing requirements for drug offenses recognizes that relevant objective and verifiable factors are evaluated to determine the rehabilitative potential of drug defendants. Salem's repeated involvement in drug activities does not bode well for her future rehabilitation, regardless of her employment history and education. Finally, although Salem cooperated with police after her arrest, the police had serious doubts about the quality of information she gave them and considered her cooperation incomplete. In light of these considerations, we conclude that the trial court did not abuse its discretion by refusing to deviate from the legislatively mandated minimum sentence for Salem's delivery offense.

VII

In a brief filed in propria persona during the pendency of the initial appeal, Salem argued that the police abused their authority in obtaining evidence by "overstepping legal boundaries or withholding evidence," citing *Juillet*, *supra*, and arguing that the conduct of the authorities violated her rights of equal protection and due process and should shock the court's conscience.

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[5] Salem was also convicted of conspiracy to deliver 225 to 650 grams of heroin, which, in this case, is punishable by imprisonment for twenty to thirty years. MCL 750.157a. Pursuant to MCL 333.7401(3), Salem must serve her sentences consecutively. *People v Denio*, 454 Mich 691, 695; 564 NW2d 13 (1997). Contrary to her argument on appeal, the trial court was not required to consider the consecutive nature of Salem's sentences in determining whether her sentences were proportional. *People v Green*, 228 Mich App 684, 698; 580 NW2d 444 (1998).

Regarding the withholding of evidence, Salem argues that information the authorities obtained through a federal court warrant and wiretap was used in state court "as evidence to support the alleged charges" and that her counsel was not afforded the right to be heard or to verify the information that was admitted. The record before us reveals that there was extensive argument on this issue at the nine-day entrapment hearing, that the prosecutor at that point explained that he had recently learned that a wiretap had been used on Salem's phones, but only for three or four weeks between February 1995 and defendants' arrest on March 7, 1995, and that the federal indictment was, at the time, under seal. We gather from the record that discussions occurred in chambers as well. Salem's supplemental brief provides no cites to the *trial* transcript, but from our review thereof, we noted statements by the prosecutor, not challenged by defendants' counsel at the time, to the effect that the prosecutor had turned over all information regarding the wiretaps to trial counsel. Because Salem does not argue how or whether the matter could have been pursued further, she has failed to argue the merits of this issue and it is not properly before us. *People v Jones (On Rehearing)*, 201 Mich App 449, 456-457; 506 NW2d 542 (1993).

Salem also argues that the authorities withheld the audio or video tape of Schreck's wedding, and the affidavit of application for Schreck's marriage; withheld that there were no fingerprints found on the plastic bag which contained the alleged heroin, and withheld thirteen pages of Hurley's report. Salem also argues that by sheer accident, her counsel came into possession of portions of an inter-office memorandum with information relevant to her arrest. Salem last argues that she discovered an article on the internet regarding unprofessional conduct of one of the officers involved in this case in different cases.

Where evidence has been suppressed we examine

> (1) whether the suppression was deliberate; (2) whether the evidence was requested; and (3) whether "hindsight discloses * * * that [the] defense could have put the evidence to not insignificant use." [*People v Petrella*, 124 Mich App 745, 752; 336 NW2d 761 (1983), aff'd 424 Mich 221; 380 NW2d 111 (1985), quoting *People v Dorsey*, 45 Mich App 230, 235; 206 NW2d 459 (1973).]

The record reveals that the prosecutor turned over the tape of Schreck's wedding to Salem's trial counsel during the entrapment hearing. That claim is thus without merit. Salem does not argue how or whether the other allegedly withheld evidence could have been put to "not insignificant use" in her defense and has thus waived the argument. *Jones (On Rehearing), supra.* Further, the record provides no indication that there was deliberate suppression of the evidence in question. Regarding the thirteen pages allegedly missing from Hurley's report, when the issue arose on the first day of trial and later, the prosecutor maintained that he had not withheld these pages, that he (the prosecutor) had provided Hurley's full report to counsel initially and had later provided a streamlined package of what he intended to use for trial, and that Salem's counsel had stated in chambers that he had received all discovery requested. Defendants' trial counsel then received full copies of the report and the trial court heard extensive argument from them, outside the jury's presence, regarding how they were prejudiced by not having the missing pages at the entrapment hearing. Defendants' counsel then were given opportunity to review the allegedly missing pages of Hurley's report before cross-examining

Hurley, and were allowed to cross-examine Hurley accordingly. Regarding the FBI memorandum that Salem argues her trial counsel received only a portion of, and that by accident, FBI special agent Feeley testified at the entrapment hearing that it was an interoffice memorandum that had been provided to FBI headquarters, three FBI field divisions, and legal attaches in several foreign countries, that only a portion of the memorandum had been provided to Assistant United States Attorney Liepson, and that the same portion of the document was provided to the defense. There is nothing before us to indicate that defense counsel would have been entitled to the missing pages of the interoffice FBI memorandum. Regarding the internet article, even if it were relevant, the article was not presented below and we therefore do not consider it. *Amorello v Monsanto Corp,* 186 Mich App 324, 330; 463 NW2d 487 (1990). We conclude that Salem has not shown that the police withheld evidence or engaged in conduct so reprehensible that her prosecution should be barred.

We affirm as to both defendants, but remand for correction of defendant Schreck's judgment of sentence.[6] We do not retain jurisdiction.

/s/ Helene N. White
/s/ Martin M. Doctoroff
/s/ Peter D. O'Connell

[6] Schreck's judgment of sentence incorrectly states as to the conspiracy conviction that the jury convicted her under MCL 750.157c (recruiting or inducing a minor to commit a felony). The MCL cite should be corrected to read MCL 750.157a.